UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WISCONSIN

MEREDITH D. DAWSON,

Plaintiff,

-vs-

Case No. 15-CV-475-JDP

GREAT LAKES EDUCATIONAL LOAN SERVICES, INC., GREAT LAKES HIGHER EDUCATION CORPORATION, JILL LEITL, DAVID LENTZ, and MICHAEL WALKER,

Madison, Wisconsin
May 18, 2017
1:06 p.m.

Defendants.

STENOGRAPHIC TRANSCRIPT OF ORAL ARGUMENT
HELD BEFORE CHIEF U.S. DISTRICT JUDGE JAMES D. PETERSON

APPEARANCES:

For the Plaintiff:

Finkelstein & Krinsk LLP
BY: DAVID J. HARRIS, JR.
TRENTON R. KASHIMA
550 West C Street, Suite 1760
San Diego, California 92101

For the Defendants:

Foley & Lardner LLP
BY: THOMAS L. SHRINER, JR.
AARON R. WEGRZYN
777 East Wisconsin Avenue
Milwaukee, Wisconsin 53202

Jennifer L. Dobbratz, RMR, CRR, CRC
U.S. District Court Federal Reporter
United States District Court
120 North Henry Street, Rm. 410
Madison, Wisconsin 53703
(608) 261-5709

(Proceedings called to order at 1:06 p.m.)

THE CLERK: Case No. 15-CV-475-JDP, *Meredith Dawson v. Great Lakes Educational Loan Services, et al.* Court is called for oral argument. May we have the appearances, please.

MR. HARRIS: Your Honor, David Harris with the law firm of Finkelstein & Krinsk on behalf of the plaintiff, Meredith Dawson, and with me is Mr. Trenton Kashima, also on behalf of plaintiff.

THE COURT: All right. Good afternoon to you.

MR. SHRINER: Good afternoon, Your Honor. Tom Shriner and Aaron Wegrzyn, Foley & Lardner, for the defendants.

THE COURT: And good afternoon to you.

All right. This case is one that I inherited from Judge Crabb, and the law clerk that's assigned to it wasn't here when this case began, and, frankly, it just seems to be kind of -- from my perspective splicing into it while it's rolling along here, there are certain things that seem confusing and unclear to me, so I thought the simplest thing to do, having gone through what is fairly described as pretty voluminous briefing on the class certification issue, is just to get people in here so you can just answer my questions, and maybe beneath all of this there's the underlying simplicity that will allow us to get this case going on the right track one way or the other.

So here -- let me just start by asking some questions. I'm not even sure which side I should address first, but it seems to

me at the heart of this there is a simple claim by the plaintiffs, and that is that Great Lakes Higher Education has been wrongfully capitalizing interest that accrues during a B-9 forbearance period, and the B-9 forbearance period is one which can endure for up to 60 months [verbatim] while the lender figures out if some application for another repayment plan or another kind of forbearance is appropriate.

So you got -- the lender has 60 days to process this application, and during this 60-day period, the interest is going to accrue, but it's not supposed to be capitalized. And that's an exception to the general rule that is during a forbearance period, such as you go to college, you decide you're going to get a degree, you want to get a master's degree so you're going to take two years, get a master's degree, during that time you're not going to pay your student loans. The interest that accrues during that period, that's ordinarily capitalized, but the B-9 exception is for a little short period where there's some processing of an application, and so the interest is not supposed to accrue during that B-9 application forbearance period against the general rule that forbearances usually result in the capitalization of interest.

How far off have I gotten so far? Who wants to start?

MR. HARRIS: I'll start, Your Honor. Thank you. And thank you for hearing our motion.

THE COURT: And we're just going to do it a little

piece at a time. We'll drill down into the complications, but have I got it right so far?

MR. HARRIS: Your Honor, as I heard you, almost.

THE COURT: Okay.

MR. HARRIS: So our claim in the complaint, and it has been consistent for the full almost two years --

THE COURT: Okay. Now, just stick to the questions, okay? I want to stay focused on the questions that I have.

MR. HARRIS: Sure. Your Honor, the only difference between what you said and our position, our claim, is, as I heard Your Honor, we're challenging whether interest that accrued during the B-9 forbearance can be capitalized, and what we're actually challenging is that at the end of a B-9 forbearance period, no interest can be capitalized at all regardless of when it accrued.

THE COURT: Okay.

MR. HARRIS: So there's interest that accrued before the forbearance, and then there's interest that accrued during the forbearance, and we're saying no capitalization under the rules.

THE COURT: For during the B-9 forbearance period?

MR. HARRIS: At the end of the B-9 forbearance period. So typically, Your Honor -- or actually always, as I understand the regulations, is when you have a deferment or a forbearance or some period that's generally what they call cappable, a

capitalization event, capitalization happens at the last -- or the day after the end of the period, so it's a one-time capitalization. So the regulations first ask, "Is this a capitalization" -- "is this a capitalization event?" If the answer to that question is "yes," the question then becomes, "What interest is supposed to be capitalized at this time?" If the answer is "no," then nothing happens. And our position is that the answer to, "Is this a capitalization event at all?" is "no."

THE COURT: Okay. Now, I think what we're going to get into is a discussion about whether it's a free-standing B-9 forbearance or whether it's a back-to-back with another forbearance event; is that right? Now we're getting -- I haven't gotten the full answer to my first question. Now we have this little refinement now where we're talking about I'll call it the stacking of forbearance periods.

MR. HARRIS: Sure. So, Your Honor, for standalone B-9 forbearances, I think we're all in agreement at this point that no capitalization happens, period, end of story.

THE COURT: Okay.

MR. HARRIS: For the back-to-back situation I think is where we may currently have a difference of opinion. Our position is that -- well, let me start with the evidence, if I may, with how Great Lakes has been doing it and then show how that matches up --

THE COURT: That's getting into a detail that I'm not ready for.

MR. HARRIS: Okay.

THE COURT: We're going to get there.

MR. HARRIS: Okay.

THE COURT: We're just doing this one step. Let me pivot over to the other side and let's find out how much -- whether they think I've made mistakes in my understanding of just this basic forbearance principles, and then we'll start to talk about the stacked forbearance periods.

Mr. Shriner, are you on the hot seat for this for today?

MR. SHRINER: Okay. Glad to be there. Your Honor is correct, in our view, that the complaint said that we were improperly capitalizing interest that accrued during a B-9 forbearance period and that that was barred by B-9. That's how we read it.

THE COURT: Okay.

MR. SHRINER: In fact, we didn't think we were but --

THE COURT: You didn't think you were what?

MR. SHRINER: Capitalizing any interest that accrued during the B-9 forbearance period because we're not supposed to, and we agree with that. That's common understanding.

THE COURT: All right. So far I don't feel like I've been completely befuddled.

MR. SHRINER: Yeah. B-9 says you don't do that.

THE COURT: Okay.

MR. SHRINER: When the lawsuit got filed, we found that due to some programming errors -- Judge Crabb mentions this in her opinion -- we had, in fact, been doing a couple -- our system had been doing a couple things wrong that led to $125 too much interest being charged to --

THE COURT: In Ms. Dawson's case.

MR. SHRINER: In Ms. Dawson's case. We found out about that, and we fixed it.

THE COURT: Okay.

MR. SHRINER: You also said something about interest does accrue during a B-9 forbearance period. It does. It just isn't capitalized, and it is never capitalized, okay? Then we get into the question of what we understand the plaintiff is saying now. This has actually come out from the class certification briefing. Now they're saying that you may not capitalize interest that accrued before the B-9 forbearance period because we all agree you can't --

THE COURT: So that seems to be the one thing that seems secure here. Everybody agrees that just the B-9 -- the B-9 forbearance itself --

MR. SHRINER: Right.

THE COURT: -- doesn't allow the capitalization of interest.

MR. SHRINER: It says you can't. It's one of the only

two regulations there are actually when we talk about -- talk about the law. There's no statute, and there are two regulations, and they are the B-9, which says you can't capitalize interest that accrues during; there is 685.205(a) that says except for B-9 forbearances, if payments of interest are forborne, they're capitalized --

THE COURT: Uh-huh.

MR. SHRINER: -- and then there's the basic rule, 685.202(b), "The Secretary may add unpaid accrued interest to the borrower's unpaid principal balance." Period. Doesn't give anything like that, and there aren't any regulations. There are regulations saying some forbearance periods are cappable; some of them aren't.

THE COURT: So tell me a little bit more about that last sort of -- sounds kind of like a catch-all. It says, "The Secretary may add" -- read it to me again.

MR. SHRINER: It says, "The Secretary may add unpaid accrued interest to the borrower's unpaid principal balance," period. "This increase in the principal balance of a loan is called 'capitalization,'" and it's 34 CFR 685.202(b). That's the only law. The rest of this is instructions from the Secretary -- from the Department, which owns all these loans either because they issued them -- they've been doing nothing but Direct loans since 2010 -- or they bought up some of the FFEL loans that were in existence by private lenders in 2010.

By law the government now owns them all. It's the only creditor, and we work for them. We have a contract with them.

THE COURT: We're getting off the point here.

MR. SHRINER: I agree.

THE COURT: That last regulation surely can't give the Secretary the authority to just capitalize accrued but unpaid interest whenever he feels like it.

MR. SHRINER: Sure, it can.

THE COURT: Well --

MR. SHRINER: Sure, it can. Now, what it does is he issues regulations saying, as I said to you, generally you will cap at the end of the forbearance period except if it's a B-9 where you may not.

THE COURT: Uh-huh.

MR. SHRINER: But that is the basic rule, and the point I want to make -- I don't want to go into great length about it -- is what we end up arguing about are servicing requirements, servicing requirements which are instructions, guidance, whatever you want to call them, from the Department to servicers. There are four principal --

THE COURT: Okay. Now, let me just ask a question here about this because normally if you've got a beef about a loan, it's a contract claim.

MR. SHRINER: Right.

THE COURT: Like you made a loan. You agreed to

certain terms --

MR. SHRINER: Yep.

THE COURT: -- and you either followed them or you didn't, and so, gosh, from my naive perspective it still seems like this is basically a contract claim. Somebody borrowed some money, and they agreed to pay it back on certain terms and --

MR. SHRINER: They tried that. They sued the government, which got kicked out on sovereign immunity.

THE COURT: Yeah. I got that too, and that's another little --

MR. SHRINER: So we're now -- so they're now after the government's agent for servicing the loans on a tort claim.

THE COURT: Uh-huh. Well, isn't it still basically an agreement between the borrower and the lender to --

MR. SHRINER: Absolutely, absolutely. And --

THE COURT: So how does Great Lakes come up with the idea that they can just capitalize interest whenever they feel like it?

MR. SHRINER: Because -- and here Mr. Harris will disagree with me. He reads the record differently than I do, but because this is very complicated, and I will show you at some point a document this thick that points out that this whole question of when you can capitalize and when not has been the subject of endless debate for the last six years. Indeed, a new rule was imposed, a new requirement was imposed May 3rd. So

this 5785 or whatever the number is that we keep talking about, the change request, actually went into effect May 3rd, just two weeks ago. So, you know, again, I don't want to get ahead of the game. I have some other things I want to say about that.

THE COURT: So that's one question that's kind of lurking in the background here is it just seems like this is fundamentally -- you know, was it according to the terms of the loan? Is Great Lakes doing to the borrower something that it's not authorized to do by the agreement? And I guess we'll get to that but --

MR. SHRINER: That's my point about the regulation --

THE COURT: Well --

MR. SHRINER: -- putting the Secretary as -- his discretion is to say when interest is going to be capitalized. That's the basic rule. That's what -- that's all that the borrower has against the Secretary is the discretion of the Secretary is the only law that's in place here.

THE COURT: And so does the terms of the agreement that the borrower has say basically I'm going to pay this back --

MR. SHRINER: Right.

THE COURT: -- according to the interest rate that's in the contract, but it's all subject to the Department of Education regulations, and those give a lot of discretion to the Secretary to do whatever he or she wants --

MR. SHRINER: I think that's what it says, yes. I'm

not sure they highlight how much discretion the Secretary has, but that's essentially what it says.

THE COURT: All right. Let's focus in where I think we're going because the agreement is that B-9 capitalization on -- or B-9 interest on its own during that B-9 period, that doesn't get capitalized. I gather the common problem is that a B-9 period, B-9 forbearance period, that's often tacked onto or arises at the end of another forbearance period. So again I use the example -- maybe it's not realistic -- but you might have a forbearance period because you went to college or you joined the military, so you're in the service for two years, and you don't have to pay back your student loan during that time; is that right? Is that a good example?

MR. SHRINER: Or you're unemployed. That's a very common one. Out of work. You get a deferment. Same difference.

THE COURT: Okay. So at the end of that, commonly enough, that might be when a B-9 forbearance period pops up; is that right?

MR. HARRIS: Yes, Your Honor.

MR. SHRINER: Yes.

THE COURT: Okay. So then the question, I'm guessing, and this is what I think from reading the papers here, is that the question arises is what happens to the interest that accrued during your unemployment forbearance when you cap it off with a

B-9 for two months while your application for some other payment comes up?

MR. SHRINER: It's capped. It would be capped at the end of the deferment, but if you go to a B-9 -- this again -- discussions went on for years. The Department eventually said don't cap until the B-9 is over.

THE COURT: Okay. And then when you do that, you capitalize the interest that accrued from the beginning of the original deferment --

MR. SHRINER: Right.

THE COURT: -- until the end of the B-9, the beginning of the B-9?

MR. SHRINER: Well, that's one of the issues because sometimes there's a gap.

THE COURT: Damn, I knew that. Okay.

MR. SHRINER: So generally the idea is from the beginning of the deferment until the end of the deferment and --

THE COURT: Now, when you say "the deferment," now we're talking about two different --

MR. SHRINER: Let's say it's unemployment or go to school, one of those deferments or forbearances. There are lots of cappable forbearances that you don't pay during that time, but the interest accrues, and at the end of the time, the interest will be capitalized. But if a B-9 follows immediately, as it often does because this is all about getting the paperwork

in order, you defer -- if I can say that -- the capping of the accrued cappable interest until the end of the B-9.

THE COURT: Okay. And my question is when you capitalize it at the end of the B-9, do you capitalize all the interest that accrued during both periods now?

MR. SHRINER: No. You never capitalize a B-9 interest.

THE COURT: Okay. So my unemployment deferment lasts for ten months.

MR. SHRINER: Right.

THE COURT: Then I've got two months of B-9 forbearance while they're doing the paperwork, and so at the end of the B-9, they're going to capitalize ten months of interest.

MR. SHRINER: Right.

THE COURT: Okay.

MR. HARRIS: Your Honor --

THE COURT: Is he wrong?

MR. HARRIS: I would respectfully disagree with that.

THE COURT: Okay. Good. Now we're getting somewhere. How is he wrong?

MR. HARRIS: So I'm going to start with what Your Honor said, which is that these are loans, and there are standard form contracts --

THE COURT: Let's loop back to that. How is he wrong on the -- because I can only keep that kind of stuff in my head for a brief period of time.

MR. HARRIS: Your Honor, the reason he's wrong is on the second page of Change Request 1492, which is the Department's only effective guidance or interpretation of its own regs during the class period up until this lawsuit. On the second page of 1492, it has an interpretation for what to do in back-to-back situations. The regulations don't address back-to-back at all, so 1492 is all --

THE COURT: So what do you think it says?

MR. HARRIS: What I can tell Your Honor it says is when you have a back-to-back -- should I pull it out?

THE COURT: This is an open book exam. Go ahead.

MR. HARRIS: What it says is a back-to-back situation only includes periods that would, quote, "otherwise result in interest capitalization." So when 1492 says B-9 is not a capitalization event, period, and then for back-to-back it says here is how you deal with back-to-back capitalization events, it's not talking about B-9 at all. What 1492 says is when you get to the end of the last true capping event, that's when you capitalize, and you capitalize interest accrued during that period, and so what would be -- what Great Lakes did is because they were treating B-9 as a capping --

THE COURT: Before we do that, just take my example.

MR. HARRIS: Sure.

THE COURT: I got ten months of deferment from my unemployment. Then I got two months of B-9 forbearance. When

is the -- is there any capitalization there?

MR. HARRIS: Yes, Your Honor. There's a capitalization event that occurs at the end of the deferment that will be smaller than what it would have been had it been at the end of the B-9 instead.

THE COURT: Okay. So there's capitalization of the ten months of interest that should occur at the end of my deferment for the unemployment, okay?

MR. HARRIS: Yes.

THE COURT: Now, Mr. Shriner said, "Well, the capitalization occurs at the end of the B-9, but it's only ten months' worth of the interest."

MR. HARRIS: So, Your Honor, that's not what Great Lakes was --

THE COURT: Well, before we get to what they've done --

MR. HARRIS: Yeah, okay. Sorry. Can you repeat your question, Your Honor?

THE COURT: Mr. Shriner -- you tell me if I get this wrong. Mr. Shriner says in the example that I give you where you've got ten months of unemployment followed by two months of B-9, Mr. Shriner says, "You capitalize at the end of the B-9, but it's only the ten months of interest that accrued during the unemployment."

MR. HARRIS: So, Your Honor, that may or may not be. I haven't seen this new guidance that came out May 3rd.

THE COURT: Uh-huh.

MR. HARRIS: That sounds like what it might be as of May 3rd on a going-forward basis, but that has never been the Department's actual instructions to servicers --

THE COURT: So what do you think should happen?

MR. HARRIS: Your Honor, what should happen is a proper capitalization event should occur at the end of the deferment excluding everything after it.

THE COURT: Okay. That's worse for your client.

MR. HARRIS: So -- because of the timing, Your Honor?

THE COURT: Yeah. Because the interest is capitalized two months earlier, and now under his version you'd actually get a little bit less interest for two months. On your version, you get a little bit more.

MR. HARRIS: So, Your Honor, that would be true if it's the same capitalization amount, but what we have here is because Great Lakes was capitalizing at the end of the B-9, that's up --

THE COURT: Now you're talking about what they're actually doing. Right now I'm just talking about what's supposed to happen.

MR. HARRIS: So, Your Honor, if what happened -- if what would happen at the end of the B-9 is that a cap would occur only for that deferment interest --

THE COURT: Uh-huh.

MR. HARRIS: -- Your Honor would be correct. That

would be a worse situation because you'd have the capitalized interest accruing for up to 60 days longer.

THE COURT: Okay.

MR. HARRIS: But no class member, the evidence shows, actually experienced that. What they got is higher capitalizations later.

THE COURT: Okay. All right. Okay. So I think I understand the basic problem. I'm not sure what the real true answer is, but at least I think I see the lay of the land here. Mr. Shriner?

MR. SHRINER: I just want to refer you to my friend, Mr. Wegrzyn, who is helping me --

THE COURT: I figured he was there for something.

MR. SHRINER: Docket 66.5, example 5, is the question you asked, and it's the Department's answer.

THE COURT: Okay. Give me the docket again.

MR. SHRINER: Docket 66-5, example 5. This is the *Job Aid* you may have seen us referring to. Basically this is all the servicers talk to the Department before the change request is put into effect, and they say, "Well, it's going to cost this to do that and how do we do that," and all of those dialogues are collected and then put out, and they are used as guidance. And there's been a new one within the last two weeks after May 3rd which basically summarizes everything under 1492 and the recent one.

THE COURT: All right.

MR. HARRIS: Your Honor, may I just correct a fact that's undisputed in the evidence?

THE COURT: Sure.

MR. HARRIS: Mr. Shriner's clients have testified repeatedly that the Department never effected Change Request 2785 until well after this lawsuit was filed.

THE COURT: Okay. Let's talk a little bit about then what you say Great Lakes has done. So help me understand what the allegations are at the heart. I know -- you don't have to repeat that it's been consistent from day one. I don't want to really get into all that. I just want to get to the answer here.

So what's the claim that -- and I look at the complaint, and I gather you've got all sorts of stuff that they're really conspiring to conceal and cover up the fact that they've been gouging people with interest. Just cutting all that to the side for the moment, just explaining what it is that Great Lakes did that was improper.

MR. HARRIS: Sure, Your Honor.

THE COURT: Okay?

MR. HARRIS: So the evidence that's undisputed between the parties right now is that during the class period for both standalone and back-to-back class members, at all times for both those sets of people Great Lakes was either treating B-9

forbearances as capping events --

THE COURT: Uh-huh.

MR. HARRIS: -- or not capping events at all, and, Your Honor, what the system has been doing up until, you know, what I'm hearing today at this hearing is never ever capitalizing at the end of the B-9 forbearance, whether it's standalone or back-to-back, and we allege that the way the system is programmed today is what it always should have been. Instead, what it was was a capitalization event always in the system which caused standalone people to get capitalizations they never should have had and caused back-to-back people to get inflated capitalizations at a slightly later date.

THE COURT: Uh-huh. And so the back-to-back people -- so that's the people like the example I just gave -- back-to-back people were getting interest capitalized at the end of the B-9 forbearance period, and it included capitalizing the interest that accrued during the B-9.

MR. HARRIS: Yes, as well as the pre-forbearance gap between the deferment and the --

THE COURT: Okay. So some of these weren't -- are kind of what we've been talking about as noncontiguous forbearances.

MR. HARRIS: I'm sorry. Could you explain that?

THE COURT: So there's a forbearance. It ends, and then sometime later then a B-9 forbearance appears.

MR. HARRIS: Yes, Your Honor. That has occurred

sometimes.

THE COURT: Okay. All right. And does that make a material difference in what's going on here or --

MR. HARRIS: Yes, Your Honor, because what the system did, and it's undisputed, is when it capped at the end of the B-9 period, it included both intra-forbearance interest and the in-between interest --

THE COURT: And that in-between period, that's when the loan is in repayment again.

MR. HARRIS: Correct, Your Honor.

THE COURT: Okay. All right. Okay. All right. And so now Mr. Shriner tells me, and you apparently agree, that they don't do that anymore. They fixed it; is that right?

MR. HARRIS: That's correct, Your Honor. We believe it's fixed as of today on a going-forward basis for the nonclass members.

THE COURT: All right. And so when they fixed it, they not only stopped doing it then, they fixed the balances that people had too I assume, right?

MR. HARRIS: Your Honor, that is yet to be done as far as the evidence shows.

THE COURT: Uh-huh.

MR. SHRINER: I didn't hear your question, Your Honor. I'm sorry.

THE COURT: The question was, well, according to Mr.

Harris, Great Lakes has now fixed this B-9 capitalization problem. They're not doing that anymore.

MR. SHRINER: Right.

THE COURT: And so they fixed it, and so I guess my question is fixing it means going forward you're not doing it anymore, but also then you've remediated the problem with respect to the loan balances that people had when they had the capitalization wrongfully done.

MR. SHRINER: Wrong.

THE COURT: Okay.

MR. SHRINER: Two things I want to say: First of all, we're doing it the way he thinks we should be doing it because the government has told us to do it --

THE COURT: Going forward.

MR. SHRINER: Going forward. And that applies to his class members too.

THE COURT: Uh-huh.

MR. SHRINER: Because obviously the class period is still running. But the other aspect of this, and I want to be clear on this, is we have not fixed -- we want to. We have not fixed the mistake, if you want to call it that. I don't call it that because I think we were doing what we thought we were supposed to be doing.

THE COURT: Right.

MR. SHRINER: But we haven't fixed it because we

haven't gotten permission from the Department to do it yet. We've given them a plan of how we would do it. We'd go back and remediate and undo all the transactions and do them the way that we now do them rather than the way we used to do them. We've sent that plan to the government in January. We're still waiting to be told to do it. They're not moving very quick. We expect they will. We don't know, but we expect they will, and since they're the principal and we're the agent, we do what they tell us to do, but we're ready to do it. We want to do it. We've always wanted to do it. We really don't like capping interest because it increases the loan balance and makes it more likely that they're going to go into default, and then we don't get paid as much as we get paid if they're in repayment because that's the compensation scheme.

THE COURT: All right. So the issue is the fix going forward, and you can't fix it until the Department of Education tells you --

MR. SHRINER: Right.

THE COURT: -- "This plan seems to work. Go ahead and recalculate people's balances."

MR. SHRINER: Right. We did that in the first remediation for the mistake that was discovered when we were actually capping some of the intra-forbearance interest.

THE COURT: So tell me what the mistake is because I gather there's -- it's described in some of the briefing, I

guess, as a programming error.

MR. SHRINER: Right.

THE COURT: That's not the main issue here but --

MR. SHRINER: I think it's not an issue anymore, but I don't know. That's what we thought he was complaining about when we read the complaint, and it's what Judge Crabb thought he was complaining about. When we looked at the complaint and we went back and looked at things, we found out that actually we had two programming errors with respect to the issue of capping intra-forbearance period -- intra B-9 noncappable interest. We always knew we couldn't do that. We thought we had our program set up so that it wouldn't happen, but there were two mistakes in the programming which we discovered when we got the complaint and looked. One of them was it was supposed to be a 60-day period, and the computer was told to do -- to count through 60 days rather than to 60 days. So there was one day extra on everybody.

THE COURT: Uh-huh.

MR. SHRINER: And the other one had to do with something really arcane but clear again. We thought we were doing it right. It had to do with how you allocate payments that come in during the B-9 period because what happened was Ms. Dawson went into a B-9 on one day and the next day made a payment, and some of that payment got allocated to the intra-forbearance period interest, and we weren't supposed to do

it. We knew we weren't supposed to do that, but it had happened. So we found out we had done it. We went back and cleaned that up for everybody, and that's happened. That's over with.

THE COURT: Okay. All right. So --

MR. SHRINER: We refer to that as remediation one, and we're waiting to do remediation two.

THE COURT: And that one is more fundamental and larger.

MR. SHRINER: Yeah. We clearly knew we shouldn't do that. We didn't want to do that. We thought we weren't doing it. We found out we had, and we fixed it. It's different from this. This is a dispute about what we were supposed to be doing, and, again, now with the new rule that went into effect May 3rd, we're all -- all the servicers are doing it the same way because the Department has finally made it clear what they want done.

THE COURT: Uh-huh. Help me understand what the ambiguity -- because this seems very logical --

MR. SHRINER: Yeah.

THE COURT: -- to me. I mean, I know it's endlessly --

MR. SHRINER: That's because you haven't gotten far enough into it yet.

THE COURT: Maybe so, but it just seems to me that the idea is that if your loan is not in repayment --

MR. SHRINER: Right.

THE COURT: -- the general idea is that you're going to have to have that interest that didn't get paid added to your balance. That's capitalization, but there's a special rule for this B-9 thing because the lender is doing the paperwork on the stuff, so you're not capitalizing there and so --

MR. SHRINER: It still accrues as interest. It just doesn't get capitalized.

THE COURT: Oh, yeah, yeah, yeah. But the solution that we have now seems like the logical answer. What am I missing?

MR. SHRINER: I don't think you're missing a thing, and when you let us do a little argument, I'll explain why I think that has significance for class certification.

THE COURT: Okay. Maybe we're there.

MR. SHRINER: Okay. This is a lawsuit for damages.

THE COURT: Uh-huh.

MR. SHRINER: Ms. Harris -- Ms. Harris. Mr. Harris. Ms. Dawson -- I have made that mistake before; I apologize. Ms. Dawson hasn't paid a penny more. It isn't just because she hadn't gotten into that point yet in her loan. It's because she's on an income-driven repayment system -- has been since before we made the mistake -- in which she pays a percentage of her income. She's been on that for three-and-a-half years. She still is. So she has never had -- she has never had an interest

payment called for or repayment called for that is tied to the balance of her loan.

THE COURT: Uh-huh.

MR. SHRINER: It's just tied to her income. So from our point of view, that means she hasn't sustained any damage.

THE COURT: Uh-huh.

MR. SHRINER: But this is a damages lawsuit. Clearly the plaintiffs are looking for a damages recovery here, and from our point of view, this is not an appropriate situation for a damages claim, and it's being -- even though the plaintiff herself --

THE COURT: I think I understand the basic trajectory of the argument here, which is that she isn't out of pocket anything.

MR. SHRINER: Right.

THE COURT: She's got a balance though that she's stuck with.

MR. SHRINER: She isn't stuck with it. You used that in your order. She isn't stuck with it because it's going to get fixed. If she ended up having to pay the, whatever it is, six hundred and something extra principal balance, that would be a different beef than she has.

THE COURT: Uh-huh.

MR. SHRINER: But the real question is, is a lawsuit, particularly a class-action lawsuit for damages, the way to

handle this?

THE COURT: Well, that's another question.

MR. SHRINER: Well --

THE COURT: But let's just talk about her financial impact here. I get it. She's not out of pocket.

MR. SHRINER: Right.

THE COURT: But there's a balance that's hanging out there that she's got to wait for Great Lakes to decide, and I know that it's really the Department of Education has got to decide, but until then, you know, she's really -- she's got this balance that is hanging out there. So she surely -- she doesn't have to wait until -- I don't know what her repayment plan is, but way late in her career she pays off the last couple of hundred bucks, and then she has the -- she doesn't have to wait until that long to have a claim.

MR. SHRINER: Well, this gets back to the point I tried to make at the beginning about the --

THE COURT: And in the meantime, her balance is reported on her credit report and so on. I get it. It's only a little bit of money, but conceivably if it were a larger amount, you know, the balance that she's got as credit gets reported and could conceivably have some sort of impact here. It's a small amount but --

MR. SHRINER: It could conceivably --

THE COURT: That's kind of speculative. I get that.

MR. SHRINER: Yeah. The plaintiff hasn't said that. The plaintiff has had opportunity to say that. She didn't say it in her deposition, and counsel has not said it in the briefing. They haven't said she's been denied a loan, her credit report has gone down, and really I think it is highly unlikely that in the three-and-a-half years of her $25,000 balance loan, the added $700 on there has hurt her a bit. It certainly hasn't cost her a penny nor is that really plausible that it has hurt her. Looking forward into the future if this didn't get fixed, I see your point, I take it, but that isn't where we are, and it isn't where we're going.

So, you know, why would -- why would this be a lawsuit for damages when she hasn't sustained any, in our view, if the government tells us we can do what we want to do, is never gonna sustain damages. We're not talking about breach of the terms of the note or the regulations, but rather the plaintiff's assertion that we're not properly carrying out the Department's instructions, which we think we always have been. I mean, he's got a different view, but --

THE COURT: Yeah.

MR. SHRINER: -- why does what the principal tells its agent to do in servicing give rise to a claim by the debtor? As you say, the debtor owes the government, doesn't owe us. We're not getting any money from the debtor. That's sort of -- to me that's a very significant issue here about why a --

THE COURT: So if they had -- it gives rise to two questions for me. So if they had a class representative that was somebody who was not in an income-dependent repayment plan, then they'd have the right class representative, and we'd be off to the races.

MR. SHRINER: Well, maybe. I don't know, but we only know --

THE COURT: You wouldn't have that argument.

MR. SHRINER: I wouldn't have that argument, but that's who we've got. That's the plaintiff, and that's the answer to question number one.

THE COURT: The second question then is isn't the reason that she's now in a position to have this fixed as soon as the Department of Education gets off its butt because of this lawsuit?

MR. SHRINER: That's what has precipitated our looking at it, but, in fact, the whole issue of when to capitalize interest is what has taken up discussions between the Department and its servicers since 2012. The *Job Aid* that just came out in connection with the adoption of the new rules has five years of the back-and-forth between the Department and its servicers about what the Department wants us to do, and Mr. Harris sees it with the clarity of day that we've always been doing the wrong thing. You know, if we ever get to trial to this, I would show you I think quite clearly that we've always been doing what we

thought was the right thing and that we've often been told by the government was the right thing.

But, again, the point of it is she doesn't owe us money. She owes money to the government, and I think if the government were to say, "Look, that's what we were telling you, but, you know, we've changed our mind, and we don't want that corrected. We have a right to capitalize interest when we want to. Don't pay it back," I still don't think they've got a claim against us. They've got a claim against the government which they can't bring because of sovereign immunity, but we didn't do it. And, yes, that's where we find ourselves. We're in the pinch.

THE COURT: Walk me back just a little bit because I see some complications here, but it just seems like the basic B-9 problem --

MR. SHRINER: Right.

THE COURT: -- you know, let alone the difficulties with the stacking of the forbearances or deferments, but just the basic B-9, where was that ever controversial?

MR. SHRINER: Of not charging interest --

THE COURT: Not capitalizing the interest that accrued during a B-9 forbearance.

MR. SHRINER: We've never thought we could do that. Regulations always said we couldn't.

THE COURT: But you were doing it at some point.

MR. SHRINER: We made a mistake and did it and fixed

it, and it was not a very big mistake, and it didn't amount to much, and we didn't know it. We thought we had it programmed right. We found a programming error, and we fixed it. But why should that give rise to a claim? Who's hurt? As soon as somebody brought it to our attention -- of course, we found out about it when we got sued; nobody talked to us -- we fixed it. I don't think this is a tort. I don't think it's negligence. Certainly isn't fraud. So I don't get it.

THE COURT: Mr. Harris? Sounds like a good invitation to pivot over to your side. Let's take it one at a time. Let's take the money damages issue.

MR. HARRIS: Sure, Your Honor.

THE COURT: I think I understand the basic parameters here. I have a little bit of sympathy for the idea that Ms. Dawson has a balance that she's, I'll say, stuck with until the government decides she's not stuck with it, but according to Mr. Shriner -- you can tell me whether what he said is factually inaccurate or anything -- they're waiting for authorization from the Department of Education to do what they think is the right thing, which is to fix the people's accounts, including Ms. Dawson's, who were wrongly -- had the interest capitalized improperly, and they're going to fix her balance.

MR. HARRIS: So, Your Honor, this whole "we're waiting on the Department" thing creates really big problems with controlling law. As Your Honor pointed out, these are loan

contracts, and what we allege in the complaint and they admitted in the answer is that there are standard terms governing these loan contracts. It's also undisputed that these standard form contracts incorporate by reference the Higher Education Act and Department regulations promulgated thereunder.

Now, Mr. Shriner said something untrue earlier. He said there's no statute. Section 428 big H, I believe, subsection little E of the Higher Education Act of 1965 expressly provides for these B-9 forbearances, and Section 432 of the Higher Education Act expressly delegates rulemaking authority to the Department to promulgate regulations to carry out the purposes of the part. All the Department did in promulgating these two regulations that we rely on is essentially copy the Higher Education Act and broaden the B-9 forbearance provisions to all FFELP and Direct loans.

So what we have here is a question of law, and if you look at our complaint, we never allege that Great Lakes violated the Department's instructions. What we allege is that Great Lakes violated the terms of the promissory notes and that Great Lakes violated the federal regulations as promulgated under the Higher Education Act. So this is a question of law, and the Court is the arbiter of what these B-9 forbearances are and what the capitalization rules are with respect to them. This notion that every time the Department comes out with a new private email to servicers the law somehow changes for everyone in America is

just not realistic.

THE COURT: Well, the fundamental dispute here is that Mr. Shriner says really the capitalization rules are discretionary with the Department of Labor. You say they're not.

MR. HARRIS: They're not, Your Honor.

THE COURT: Okay. All right. I have the clear-cut dispute here.

Okay. What about the problem that Mr. Shriner has pointed out, which is that whether you think they should be doing something different or not, they're waiting for approval of the remediation plan from the Department of Labor -- I'm sorry, the Department of Education -- and if they get that, then Ms. Dawson is going to have her balance corrected before she ever is out of pocket even a dime.

MR. HARRIS: So, Your Honor, that may or may not happen in the future. I sued the Department two years ago, and this hasn't gotten done, and, you know -- but let's assume it does get done because I think that's what the Court is getting at. The question presented here for standing purposes, if you will, let's call it statutory standing, is whether -- and this is RICO claims only, not common law negligence -- but the question presented as far as we're concerned is whether the imposition of wrongful federal student loan obligations themselves constitute an injury to business or property under 18 U.S.C. Section 1964,

and we briefed that exhaustively in the renewed motion, and I won't belabor all that case law here.

So our view is that Ms. Dawson either had a RICO claim at the time of suit or she did not, and if she did, if she had an entitlement to damages because she had a RICO injury at the time of suit, under *Liquid Air*, which is a decision from the Seventh Circuit a couple of decades ago, you can't set off damages just by providing prejudgment one hundred percent relief. Seventh Circuit said, "We think setoff after trebling would better effectuate the purposes behind RICO."

THE COURT: Okay. And that's just on the RICO claim. What about your fundamental --

MR. HARRIS: I think if they -- if they literally --

THE COURT: -- your breach of contract.

MR. HARRIS: -- give everyone a hundred percent relief, and we agree on what that is -- now, the Department could come out tomorrow and say triple everyone's debt. Does that end the case? No, Your Honor, because we're going to have a disagreement with the Department itself about what the law is and what the contracts say.

THE COURT: Okay. So let me drill down on your side of the equation here then. Tell me who is in the class. I mean, fundamentally I don't really have to resolve the merits of the case here, but I do have to be able to figure out who is in the class, and that is not entirely clear to me.

MR. HARRIS: Your Honor, who is in the class is, as it's defined, anyone who received -- anyone for whom a B-9 forbearance was treated as a capitalization event by Great Lakes, and it includes currently both back-to-back and standalone people. Now, what I would say is a really important point is if at the end of the day and after all the argument the Court determines that these back-to-back people are uninjured because, as you said in your order, they had some other event that warranted capitalization, if the Court determines they're uninjured or too problematic under Rule 23, the better course here is to amend the class definition to write them out, and if they want to bring their own claims, they can do that properly. But the Seventh Circuit in *Messner* back in I think it was 2010-ish, Footnote 15 of the *Messner* case from the Seventh Circuit said, you know, where there's an overbreadth problem with the class definition, the better course is to amend the definition rather than deny certification altogether.

THE COURT: And remind me, is Ms. Dawson just in the free-standing B-9?

MR. HARRIS: She is standalone only. Yes, Your Honor.

THE COURT: Okay. I thought --

MR. HARRIS: And, Your Honor --

THE COURT: I'm easily confused here because I thought there was a detail where she had something else.

MR. HARRIS: No, Your Honor.

THE COURT: So she's just --

MR. HARRIS: She was standalone only.

THE COURT: She applied for this income-based repayment plan, had the B-9 forbearance as a result of that application, and that's all that is.

MR. HARRIS: Correct.

THE COURT: Okay.

MR. HARRIS: And, Your Honor, if -- you know, I can give the Court the language that I would use to amend the class definition if the Court wanted to include standalone people only because what we see in Docket 83 and in defendant's response to my motion to vacate is that they literally said in their email, "We have identified all the caps that need to be removed," and they estimated the damages to standalone people only at $20 million. That's a large class of people with wrongful debt.

THE COURT: That's the 360,000 people? Is it 360,000?

MR. HARRIS: So, Your Honor, we currently don't know how many standalone people there are out of the 360,000. What we know is however many standalone people there are have $20 million worth of debt inflation approximately.

THE COURT: Okay. And what does the 360,000 borrowers represent?

MR. HARRIS: The 360,000 is both standalone and back-to-back people.

THE COURT: Okay.

MR. HARRIS: And we allege that none of them should have a cap. Standalone people should have had zero cap. Back-to-back people should have had a smaller cap, and, Your Honor, we have a process that's in the undisputed evidence by which we can both reduce back-to-back members' capitalizations properly and eliminate standalone people's capitalizations properly in one stroke, in one process, the same damages methodology for everybody. Defendants right now are refusing to do anything for the back-to-back people. They're saying, "Okay. You got us on the standalone people now, but the back-to-back people the Department is now saying, you know, they deserved a cap -- they deserved the cap that they got."

THE COURT: And clarify for me how -- what happened to them. With the back-to-back people -- I thought we were at the outset sort of in agreement about what should be happening.

MR. HARRIS: We are not, Your Honor. I mean, the defendants -- so Mr. Shriner said a while ago, you know, that they read our complaint to say we were only challenging intra-forbearance interest.

THE COURT: That's what he thought.

MR. HARRIS: But, Your Honor, it's not because they expressly came against that -- our regulatory theory in their answer. They read our footnote -- I believe it was Footnote 12 or Footnote 7 in our complaint -- where we defined what was and was not cappable for a B-9 forbearance period, and we said

nothing is cappable, and they came in in their answer and said, "No, the plaintiff, quote, 'fundamentally misunderstands the regulations.' What the regulations really say is that intra-forbearance interest is not cappable, but it's still a capping event, and we capitalize everything before that. Everything before that 60 days the regs say we can capitalize."

That's the first remediation they did, and they came in at class cert and said, "Your Honor, everyone has been made whole. The entire class now lacks standing," and we said, "Wait a minute, Your Honor. That's not our case. What our case is is that no capitalization is allowed at the end of these periods," and we fought that hard on reply. In response to our reply brief, they emailed the Department and said, "Hey, guys, are you sure about this?" And they even put in Docket 83 in the motion to supplement that the briefing highlighted the regulatory dispute between the parties, and then a year after I sued the Department alongside them, they somehow can find out from the Department for the first time that we were right all along and that nothing is supposed to be capitalized at the end of these periods. Now, as they come out admitting that these are not capitalization events at all, starting with Docket 83 they're saying, "Well, they're still capitalization events for back-to-back people." That's nowhere to be found in the record --

THE COURT: So what was their previous position on what

should have been capitalized?

MR. HARRIS: Their original position in this case?

THE COURT: You indicated that prior to Docket 83 they had a different position on what should have been capitalized. What was the previous position?

MR. HARRIS: Yes, Your Honor. Their previous position was B-9 -- the end of the B-9 forbearance is a capitalization event under the rules. However, all that can be capitalized is interest that accrued before the B-9 period and that these two regulations that we cite --

THE COURT: Now, hold on. I think that's what Mr. Shriner said at the top of the hearing when I asked him. I think that's what he said is that at the end of the B-9 forbearance period, that is the point at which you would capitalize the prior forbearance interest or deferment interest. You would do it at the end of the B-9, but it would only cover the pre B-9 interest.

MR. HARRIS: So, Your Honor, as I understand their current position today, that is their position only for back-to-back class members. I do not believe it is currently their position that a standalone gets any cap at all.

THE COURT: I think that was also what we agreed on at the beginning and -- that if you have -- Ms. Dawson should not have had any of her interest capitalized.

MR. HARRIS: Yes, Your Honor, along with all other

standalone class members.

THE COURT: So I'm still -- that's what confuses me here about prior to Docket 83 there was a different position taken. I still don't know what that was.

MR. HARRIS: Their position was that for standalone periods -- before Docket 83 their position was that for standalone periods, you capitalized at the end of every single one of them. You just limit that capitalization to most of the interest, which is the interest that accrued before the B-9 period. They read the regulations in isolation, 682.211(f)(11) and 685.205(b)(9). They read those two regulations in isolation, and all they say is interest that accrues during the period is not capitalized, so they went, "Oh, okay. So we can still capitalize. We just have to do a carve-out."

THE COURT: Just not the period of the B-9 itself.

MR. HARRIS: Right.

THE COURT: That's the thing that's, I guess, confusing me because -- you can clarify this for me. Maybe I'm just not sensitive enough to the varieties of occasions on which somebody might find themselves in a B-9 forbearance that's called a standalone because I think of somebody who is in a deferment or forbearance because of education, military service, unemployment, what have you, and then they go into a B-9 capitalization. That's the back-to-back situation. The person who is in a standalone B-9 situation goes from repayment into a

B-9.

MR. HARRIS: Yes, Your Honor.

THE COURT: If you're in repayment, you're paying the interest as you go, so the way I envision the typical B-9 forbearance period, standalone forbearance period, there isn't any other interest to capitalize. There's no accrued interest to capitalize because normally when you're in repayment, you're paying off the interest as you go and maybe a little bit of principal, so there isn't this interest that has accrued and ready to be capitalized except for the interest that accrues during the B-9 period itself. Now, am I wrong about that?

MR. HARRIS: Yes, Your Honor, technically.

THE COURT: Good. So how is that?

MR. HARRIS: There are different situations that could cause someone who is in repayment to have substantial amounts of pre-forbearance interest outstanding at the time of the B-9 forbearance. If you look at one of plaintiff's accounts that are in the record -- she has three accounts -- one of them she had -- it was a consolidation loan, so what happened is she had a bunch of loans got consolidated with principal and interest, so she had this big interest balance at the time that she began -- at the time of the origination of this consolidation loan. So she had this big interest balance, and her standard payment plan had her paying that down, but it was going to take her a couple of years to get to the point where she was even

hitting principal because she had this big bucket here at the beginning.

THE COURT: Okay.

MR. HARRIS: Another way, Your Honor, apart from consolidation loans would be in general for all loans, it depends on when your payment due date is. It depends on the last time you made a payment. If you're making a payment every 30 days, that covers all interest. You know, your last payment may have been 29 days or 30 days before the time you enter B-9 forbearance, so you've got --

THE COURT: So you could end up with a payment period worth of interest.

MR. HARRIS: Right.

THE COURT: Okay.

MR. HARRIS: And, Your Honor, we know all this adds up to $20 million at this point. I know we can say, well, we're just nickel-and-diming here --

THE COURT: No. I've never really had the view that it's just nickel-and-diming. I just want to make sure that I understand it, and that's the situation that I hadn't really contemplated was that somebody in a standalone B-9 actually is going to have a significant amount of interest that is at jeopardy of being capitalized.

MR. HARRIS: Yes, Your Honor. The standalone people had enough interest wrongfully capitalized to accrue $20 million

worth of wrongful interest just over the last few years. So we're talking $100 million or more probably in wrongful standalone capitalizations.

THE COURT: All right.

MR. SHRINER: Not true, Your Honor. The $20 million --

THE COURT: All right. Go ahead.

MR. SHRINER: -- is the whole shooting match.

THE COURT: What's that?

MR. SHRINER: The $20 million is the whole shooting match.

THE COURT: Standalone and back-to-back.

MR. SHRINER: Yes. And I want to make sure --

MR. HARRIS: Your Honor, that's not what the record says.

MR. SHRINER: I thought we were clear earlier on, and now I'm not so sure. We have thought that the standalone B-9 forbearance period, the end of that was the occasion for capitalizing accrued interest. That has been our interpretation of the Department's guidance up until the time last summer when they told us that they were going to change things going forward. So we're now, because the Department has told us to do that, not doing that, but we used to have that view, that that was the right way to do it. We still think that was the right way to do it based on what we were told at the time, and that's, you know -- so, again, you know, there are people who owe a lot

of money before they go into a changeover --

THE COURT: Yeah.

MR. SHRINER: -- and we interpreted what we were told by the Department to tell us that at the end of a B-9 forbearance period, we should accrue interest that was owed before, not during the B-9, but interest that was owed before. So that's what this money is about. He's absolutely correct.

THE COURT: Okay. Maybe I have a better handle on the fundamental dispute here. Again, I don't -- you say it's the 20 -- I had thought it was the 20 million just for standalone as well, but, you know, that's --

MR. HARRIS: Your Honor, that's what the record says.

THE COURT: Fine. It's a lot of money. You know, it's Everett Dirksen territory here. I'm sorry, a reference that Mr. Shriner is the only person in the courtroom old enough to understand.

MR. SHRINER: Are you talking about "real money," that one?

THE COURT: Yeah. That's the one. See, I told you. Anybody else hear that? Of course not. Maybe our CSO.

MR. SHRINER: $500 million here, a billion there.

THE COURT: Yeah. Pretty soon you're talking about real money.

MR. SHRINER: Congressional viewpoint.

THE COURT: Yeah, yeah. So I guess what I'm getting at

here is that -- let's just take this example: We've got somebody with a standalone B-9. They're coming into it. They have a significant interest balance, and you say at the end of that B-9 period, that interest does not get capitalized. Sort of current state of knowledge and regulations.

MR. HARRIS: Correct.

THE COURT: I'm confident that I've got your position right. Mr. Shriner, is that now your --

MR. SHRINER: That's what's happening going forward.

THE COURT: Okay. All right.

MR. SHRINER: But it isn't what we used to do, and we still think we were correctly interpreting the guidance we were --

THE COURT: You were following orders. Right or wrong, you were following orders.

MR. SHRINER: Absolutely.

MR. HARRIS: Your Honor, the record shows -- Mr. Shriner can say whatever he wants. Ms. Kielhofer testified repeatedly that that's not what they were doing leading up to this lawsuit. What the record shows is that leading up to this lawsuit they reprogrammed the system to stop all standalone capitalizations. She testified in the GLELSI deposition, Docket 53.

THE COURT: That's before the lawsuit did you say?

MR. HARRIS: So mid-class period -- can I go in

chronological order?

THE COURT: Sure.

MR. HARRIS: So, Your Honor, what she testified during the GLELSI deposition is that they had been treating standalones as capping events leading up to the time when they received Change Request 1492. She testified that, "When we received Change Request 1492, we read that request to say at the end of the B-9 forbearance or noncappable forbearance, do not capitalize any interest," period. She said that five times in the GLELSI deposition, that that's how Great Lakes read it. She further testified that, "Because we understood it that way, we changed our system to comply with our understanding," and there's no dispute that they, in fact, did that.

The problem we have that was the impetus for this suit was not the current state of the system or the law at the time of suit. It was that once they realized they had been doing it wrong for years, they should have gone back and complied with the Department's instructions. Instead, they delayed a few years in implementing their understanding of the Department's instructions, and when they did, they didn't go back and fix people who should have had zero capitalization, and that's what they're now saying, you know, they're willing to do two years into the lawsuit.

Why didn't they say that when they first got sued? They couldn't email the Department, you know, a few weeks after we

sued them? In fact, Your Honor, they admit that in response to the complaint, they recognize that they had one last lingering B-9 forbearance identifier in their system that was still treating standalones as capping events, and they say -- this is defendants saying this in response to the complaint -- they changed it so that it would never capitalize, and then they come into this court six weeks later and plead that they're capping events with the Department just taking a sovereign immunity position and getting out of Dodge.

MR. SHRINER: Your Honor, I misspoke, and Mr. Harris is correct. We had three different categorizations, and we stopped capitalizing on the one of them in April 2013, another one in April 2014, and the last one in October 2015. The lawsuit was filed at the end of July.

My larger point, which I was trying to make and got the details on this wrong, was that the theory that we knew what we were doing was wrong and we were trying to hide it is just nonsense and that we thought at the time that we were doing it that we were doing it the right way. And that's essentially it. And since what we're doing is carrying out our contract with the Department and doing what the Department tells us to do, you know, we get back to this point.

You keep coming back to the point, and Mr. Harris adverted to it too: What does the contract say? We don't breach the contract. Whatever we do, we don't breach the contract. We

either correctly or incorrectly carry out the will of the Department, which is the contract party, in servicing these loans, and to the extent that we do something that they don't want us to do, we change when they tell us to. We don't hide what we're doing from them. We're doing what we're told, and it's our best understanding at the time we're doing it as to what we're supposed to do.

This is immensely complicated. We talk about B-9, you're talking about a pimple on a huge mass of loans and servicing of loans. You know, interest capitalization itself is a tiny part of what goes on in the servicing, and the *Job Aid* that has just come out is huge about all of the questions at every stage when we've gotten into talking about capitalization of interest that all of the servicers have had with the Department about, "What do you mean? Do you do it this way when this comes up?" There are just hundreds of different scenarios that arise. These are people -- complicated people leading complicated lives. We get all kinds of different things that come up, and we try to have our system working in the way that we think comports with the rule.

If we're wrong, then I still come to the point that I don't think there's a claim against the servicer for being wrong. Either we did it wrong and the Department will tell us to fix it, which we've asked them to tell us to do, or they will tell us, "Don't fix it," in which case by definition retroactively we

didn't do it wrong. There is no -- this is not a source of law that can be utilized by a borrower against the servicer because the servicer didn't breach the contract. If the servicer did something incorrect, the government breached the contract. And no reason to believe that the government will not tell us to go forward with this.

So we're really in the position where -- I raised this point before -- what are the plaintiff's damages? They aren't out of pocket. The plaintiff isn't out of pocket at all. We pay the plaintiff damages, what does the plaintiff do with the money? When we correct it, it gets fixed again. It's a double recovery. It's either A or B. You either go to court or you get it solved in the Department, and since it's a departmental issue, the relationship between the Department and its borrowers, that's where it ought to get fixed.

THE COURT: All right. So here is the way I see this: There are some threshold issues that I have to decide about whether the case should go forward. I'll kind of summarize them -- sloganize it even; I'm not even as dignified as that. You got no damages according to Mr. Shriner, so if I decide that way, we don't go forward on that basis. The concern that I had coming in here is that we had a class that was kind of amorphous and difficult to identify. That doesn't seem to be that big of a problem. Mr. Shriner, it's really -- he's going to agree with me, but what do you think?

MR. SHRINER: With respect, I think it is. What I hear him saying is, "Well, you know, I can't come up with a theory about how the back-to-back people are going to be harmed once this gets fixed, but, you know" --

THE COURT: That's true of everybody.

MR. WEGRZYN: Your Honor, if I may?

THE COURT: You can talk too.

MR. WEGRZYN: We're getting to the fourth class --

THE COURT: I don't know what they bill you out as, but, you know, it's not like the actors' union where they have to pay you more because you said more than five words on camera. So go ahead. Talk.

MR. WEGRZYN: I'm just raising for the fact that we're now on to -- Mr. Harris raised the prospect of amending his class definition on the fly here and cutting it back down further. We're on the fourth, you know, class definition. It's a little difficult for us to, you know, assess how many people are in the class, whether it includes standalone, you know, borrowers --

THE COURT: There's a lot of people. There's a lot of people in the class.

MR. WEGRZYN: I mean, there's a lot -- I mean, yes, technically if we have a single definition of the class, these are the types of people it's going to include. We can, you know, program something to identify them.

THE COURT: Here's the bottom line: It seems to me that Great Lakes has a pretty good handle in its information systems on the people who are in the various buckets, however many buckets we think is appropriate. Maybe it's only the standalone people; maybe it's the standalone and the back-to-back, but it doesn't seem to me that there's a real problem in identifying who they are.

MR. WEGRZYN: In terms of pulling up their contact information and sending them a letter, no, but --

THE COURT: And we can figure out, okay, these are the people who had a B-9 -- standalone people. They got a B-9 capitalization event. We can identify those people. Now, maybe there are some other problems in calculating their damages and stuff like that, but at the very just starting small, like, we can identify those people who had a standalone B-9 forbearance and it was a capitalization event.

MR. WEGRZYN: Our issue is not with the mechanics of finding people.

THE COURT: Yeah.

MR. WEGRZYN: It's with what is the class definition, you know, what types of borrowers is it covering. We don't know.

THE COURT: Well, I assume everybody who has got -- I can't remember the acronym. The FFEL loans? Which loan categories are we talking about?

MR. HARRIS: FFELP and Direct loans, Your Honor.

THE COURT: So FFELP and Direct loans, standalone B-9 capitalization. The definition of the class does not seem to be problematic.

MR. SHRINER: Well, it is sort of because to the extent that you've got people in the class who in my view don't have a claim --

THE COURT: Uh-huh.

MR. SHRINER: -- and that's always significant in class definition --

THE COURT: I agree with you there. That goes to that threshold issue. If I decide that your way, we're done.

MR. SHRINER: It's the back-to-back people.

THE COURT: Okay. So the problem is going to be the back-to-back people.

MR. SHRINER: I think that's going to be the problem. The other one is where do we get with January 2006? We didn't start servicing student loans until 2009. I mean, where does that come from other than a desire to have a big number. We've never had an explanation for how you could have a class -- I mean, we didn't get the -- basically where he comes up with his argument about we should have figured out that they were talking about triggering events and so on until CR1492 that didn't come out until over six years later. I mean, what have we done wrong that could possibly be the source of having a class that goes

back to two thousand -- six years before what we supposedly didn't interpret right happened? I mean, it's just -- to me it's just -- it gets back to the point --

THE COURT: Okay. So I get it. There's a problem with defining the beginning class period. What are the other issues with the back-to-back class?

MR. SHRINER: Well, other than the fact that I haven't even heard of a plausible basis for thinking they have a claim?

THE COURT: Uh-huh.

MR. SHRINER: I mean, you know, we are --

THE COURT: Again, that seems like the threshold issue, that if I go your way on that, we're just done. We don't have to fuss over the details --

MR. SHRINER: Yeah.

THE COURT: -- of the claim.

MR. SHRINER: Right. No. That's true. I mean, I have got other questions -- you're talking about class definition. Well, those are my concerns about class definition and length of time.

THE COURT: All right. Address the class period.

MR. HARRIS: Sure, Your Honor. January 2006 is when the regulations that we allege were violated here were first promulgated. Great Lakes has been servicing FFELP loans for decades, and they admit that --

THE COURT: You said 2009 I thought.

MR. HARRIS: Yeah, that's when they started servicing Department of Education-held loans, Your Honor, but they've been servicing FFELP loans that are guaranteed by the Department of Education but that are actually held by private lenders for quite a long time, and those FFELP loans that are held by some of the outstanding private lenders have the same terms and are subject to the same FFELP regulations as the Department-held loans, and that's never been in dispute.

THE COURT: All right. So there's the answer on the date.

MR. SHRINER: Well --

MR. WEGRZYN: So, I mean, that regulation that he's referring to, this is what it states: "Interest that accrues during this period is not capitalized." So that doesn't tell us anything about what he now says his claim is.

THE COURT: It doesn't answer --

MR. HARRIS: Your Honor, we don't interpret statutes and regulations in isolation. They're part of a large regulatory framework.

THE COURT: I get it. All right. Well, I don't have an answer for you. I will give you a kind of an open-mic moment here to tell me anything else you think I need to know, but I think you've answered your questions -- my questions today. So let me -- I'll give you -- Mr. Harris, I'll start with you. Anything else you want to tell me that directs my attention to

the issues that I've raised or that you think ought to be raised here as long as we're all together?

MR. HARRIS: Sure, Your Honor. You know, I'm not sure where the Court stands on the back-to-back people right now, but I would just like to reiterate that the way to go here if the back-to-back people are a problem is to just carve them out of the class, and that's pretty clear in Seventh Circuit law, and specifically the way we would do that is in the third prong of our class definition where we say "an administrative forbearance status for a period of up to 60 days," we could simply add a parenthetical that says "that is not immediately preceded by another forbearance, deferment, or grace period," and that would simply carve out all the back-to-back people right there, and all you'd be left with is this perfect standalone class that everyone agrees is uniform.

If you look at Docket 83, what the Department is saying in their purported emails is that standalone forbearances were never cappable events. What Change Request 1492 says, the only guidance ever in effect before apparently May 3rd of this year, what that says is that standalone forbearances were never capitalization events during the class period. It says that, "This is a clarification of our regs, and it provides no new requirements."

Your Honor, what this case is, it's exactly what happened before Your Honor in *Groshek v. Great Lakes Higher Education*.

You know, that was a fair debt collection practices case I think or something like that, and there was an allegation of willfulness, and they came into court on a motion to dismiss and they said, "That's not what the law means. You know, it means this other thing, and that's why we're doing it the right way," and Your Honor rightly held that you can't just come in with a legal ambiguity post-lawsuit and defeat allegations of willfulness, much less change federal law via email from someone named Cynthia Battle who hasn't even come into court with a declaration or anything. You know, so what we have here is a classic *Groshek* case.

We should really be looking at the record of what happened leading up to the lawsuit, and then we can evaluate the mess that unfolded afterwards, but the law is really clear that the Department can't change its own regs in response to a lawsuit that alleges they violated the regs. And so a lot of these complications are going to be moot. The Court is the arbiter of what the law is. These are official regulations promulgated under the Higher Education Act incorporated into every single contract, so that's sort of the first -- if we were going to think about this, the merits of this case as a class action and how we're actually going to resolve it, the first step would be let's decide what the rules mean.

Great Lakes has said in the declaration, "Your Honor, we will do whatever the Department says." If they can do whatever

the Department says, they sure as heck can do whatever Your Honor says the rules are, and maybe the Department, you know, can get its act together at that point. Whether it's screwing around or just doesn't know what its own rules are, I don't know what is going on at the Department in response to this lawsuit. I can't explain why they were sued side by side, came in and pled one regulatory theory seemingly together, even though it wasn't technically together, and then a year later after the evidence comes out of what their private guidance was, then they suddenly reverse course? You know, the complications really only arose after the lawsuit, and I think the Court should look at that, you know, certainly as a reason to not consider every little thing the Department says post-lawsuit as law. You know, now these department musings that post-lawsuit aren't entitled to judicial deference -- CR2785 they admit was never effective even months into the lawsuit -- you know, what is the Court to do with the Department's wishy-washiness post-lawsuit?

All of that goes, Your Honor, to whether Great Lakes was negligent or whether they acted fraudulently. It may be that the Court decides that Great Lakes acted illegally here in whatever fashion, and then the issue of what the Department told Great Lakes to do, that may be, you know, at various points in time, whether before or after a lawsuit, that may go very well to whether they acted reasonably or whether they acted in good faith in inflating these loans --

THE COURT: And just to be clear, I sense that -- your implicit agreement with Mr. Shriner that it's really not a breach of contract case anymore.

MR. HARRIS: Your Honor, yeah --

THE COURT: The Department --

MR. HARRIS: It was a breach of contract case against the government, but we also alleged as part of our negligence and RICO cases that as a third-party agent, they knowingly caused the Department to violate its own loan terms and its own regulations.

THE COURT: Okay.

MR. HARRIS: So there's definitely no breach of contract claim here. It's a RICO claim, and it's a common law negligence claim, and I would like to address something that Your Honor said previously in terms of determining here whether anyone has a claim. So the Supreme Court has been really clear. One of the places is in *Amgen*. It was a securities case back in 2013. Really good opinion that explained whether or not to go into particular merits issues under Rule 23, and what they said is, and the Seventh Circuit has repeatedly adopted this in recent years, is you only go into the merits insofar as necessary to determine whether Rule 23's elements are satisfied. And so what that means is once something is identified as a common question, whether it's a common question of law or a common question of fact like defendant's state of mind, that is

not to be adjudicated under Rule 23.

So what is the injury issue that can be properly adjudicated under Rule 23? It's the threshold issue of Article III standing, and defendants have never challenged that at any point in the case with respect to Ms. Dawson. And, you know, in fact, they cited the Seventh Circuit's *Bible* case in their opening round of briefing implicitly conceding that this is a valid injury because that's what the Seventh Circuit has made pretty darn clear over and over again. It's what the Second Circuit held in the *Donziger* case that we cite in Docket 125. It's that the imposition of wrongful debt is an injury to property.

THE COURT: They also -- they meaning the Great Lakes -- has also said that under Rule 23 I can look at the kinds of questions that would arise, so that for your RICO claim, their argument is that reliance would be an element of your RICO claim, and so as I look at this from the Rule 23 perspective, I have to look at what would undoubtedly be very complicated and various set of answers about whether any of the class members had actually relied on the alleged misrepresentations here.

MR. HARRIS: So, Your Honor, reliance is decidedly not an element of RICO. It often plays into whether there's causation.

THE COURT: Which is how they do -- that's -- their

analysis is causation is an element. That means there has to be reliance. How else would you establish causation in this kind of case?

MR. HARRIS: So, Your Honor, according to the *BCS Services* case from the Seventh Circuit that we relied on in our reply brief on the renewed motion, what that case held at summary judgment in a RICO case, and it was actually the appeal on that *Phoenix Bond* case that we rely on pretty heavily for injury purposes, what the Seventh Circuit said there is under RICO and generally for tort claims, once the plaintiff establishes the type of injury that would be, quote, "the expected consequence of the alleged misconduct," you've done enough to take that case to trial on causation.

The Seventh Circuit also held that -- I believe it was *McMahon v. LVNV Funding* in 2015 or 2016 -- well, I don't know if they held this, but they said it outright, you know, if you can prove damages, then you've automatically proved causation, and that's what we have here. What they say in Docket 83 is, "We've identified the caps that we think need to be removed," and then they say, "We've submitted a plan to the Department that, you know, takes care of everybody" --

THE COURT: Which case is the one that equates damages to causation?

MR. HARRIS: Your Honor, I believe it was *McMahon v. LVNV Funding*, and it was 2015 or 2016 in the Seventh Circuit.

THE COURT: Okay.

MR. HARRIS: But particularly the *BCS Services* case is really instructive on causation. It's practically a treatise on RICO and tort causation from Judge Posner, and that was a case that was far more unwieldy for causation purposes than this one is, Your Honor, because here all we have to do is look in a database and see what happened. We don't have to go to Betsy Borrower or Danny Debtor and say, "Hey, what happened to your loans? How were they miscalculated?" We query the GOALS system for -- and that is in the GLELSI deposition also when Ms. Kielhofer talks about the back-off process that they use to calculate damages --

THE COURT: I'll tell you I just have a much more kind of common-sense reaction to the idea that this is a RICO fraud case, and that is that this all starts with some fraudulent misrepresentation which I gather you're going to intend to -- simply when they send out a loan statement that reflects an inflated balance.

MR. HARRIS: Your Honor, actually our primary theory of the RICO injury, the RICO causation, is found in the servicing contract and in the deposition testimony about the servicing contract. They transmit these loan balances directly into the Department's database. No one looks at this information as it's coming in. It goes directly into the National Student Loan database, directly into the federal Treasury's ledger, general

ledger, and then it goes, you know, to all the credit bureaus and every Wall Street lender on the block.

So when they're transmitting these things ubiquitously throughout the financial authoritative universe, what they say the debt is is what it is, and the Court can see that in the evidence because when they did the remediation project -- the, quote/unquote, "remediation project" the first time around in Docket 66, they identified over a hundred people who had actually paid off --

THE COURT: The issue is that the -- under that theory any error, any common error, then ends up being a RICO fraud. Where is the fraud part?

MR. HARRIS: Your Honor, the fraud part comes in so far -- we don't have a lot of evidence. We've been denied emails, and we've been denied some other discovery so far pending class cert, but the fraud as we can see it today comes from Change Request 1492 and Ms. Kielhofer's deposition testimony about 1492. It also comes from the fact that at the end of the day before a jury, actions speak louder than words. What they did following the change request is they reprogrammed their system to comply with their understanding of the regulations and of the Department's requirements, and so if you understood it enough to reprogram your system, you understood it enough that you could have, you know, stopped inflating people's loans who you had already wrongfully inflated.

THE COURT: Okay. So when you're presenting all this to the jury and Mr. Shriner stands up and says, "Great Lakes has nothing to gain from doing this," how could this possibly be best explained as a conspiracy to defraud the lenders? They did this all on behalf of the government? Did they get a commission somehow? I don't --

MR. HARRIS: So, Your Honor --

THE COURT: It doesn't have the ring of plausibility.

MR. HARRIS: Sure.

THE COURT: I know I'm not answering that question now, but it just, as I try to get my hands on this case, it just doesn't scream out that this is a fraudulent conspiracy here.

MR. HARRIS: So, Your Honor, if we want to talk about motive, you know, our allegations in the complaint --

THE COURT: It's simple. Maybe they get paid by how much they --

MR. HARRIS: They do, Your Honor. So here is what the servicing contract says. Servicing contract says you get paid on a per-borrower basis every month, and you're required to comply with our requirements and with the regulations. If we find out that you haven't complied, all of the servicing fees that we have paid you are not -- come back to us. These borrowers aren't going to be billable going forward, and anyone we've paid you for whose loans were noncompliant, all that money comes back to us. So when they realized they had been doing

this wrong for several years, and they may have looked, maybe they didn't look, but the evidence now shows there were hundreds of thousands of people --

THE COURT: Okay. So the theory is they made a mistake, and they had to cover it up or they were going to get --

MR. HARRIS: Your Honor, that's the complaint's theory. I mean, we really stand by the complaint's theory, and we think it's been borne out by the evidence to an extreme throughout this case. The only thing we haven't really gotten to yet in either direction is whether they changed their website to cover up these transactions from borrowers. We just haven't done the discovery on that particular issue yet because we've had a lot going on in every other area, but the complaint's allegations have really been proven by the undisputed evidence so far.

There's a lot of discovery left to do. Emails would be very helpful in a fraud case, and, you know, we had an agreement on those, but for whatever reason Judge Crabb denied those agreed-upon 97,000 emails as moot, you know, with Docket 85. But there is a motive and opportunity here that's colorable, and at the end of the day, Your Honor, is the real answer I think: They just don't care. The Department just doesn't care. Great Lakes just doesn't care. Nobody cares except the borrowers whose loans are inflated by 20 million and are growing every day. These repayment periods are 10, 20 years sometimes. So

that 20 million is going to become 100 million, and, you know, yeah, we may have a $1.4 trillion student debt bubble, and, you know, at the end of the day who cares, but, you know, it matters to people like Ms. Dawson, and it matters to a lot of other borrowers who already owe enough, and the least we can do is follow the bad rules that are in place.

THE COURT: Okay. All right. Mr. Shriner.

MR. SHRINER: I want to say something before I get too far, and that is I've referred a couple of times to the *Job Aid*. What I'm referring to is Exhibit 1 to Mr. Harris's declaration. It's -- you see how thick it is and how many post-it notes --

THE COURT: What's the docket number on that?

MR. SHRINER: It's Docket No. 120-9, and it is what I have referred to earlier as a back-and-forth among the servicers and the Department about what this capitalization thing ought to be and how it ought to be done. If anybody can read this and say, you know, "It was perfectly clear what everybody should have done, and we knew it, and when we found out that somebody else had found out that we had been lying about it, we covered it up," I absolutely don't understand this, how this could be a fraud case.

I also don't understand how you can find a negligence claim on the question of whether or not the servicer is properly carrying out the instructions it gets from its principal if the principal either backs them up, in which case it isn't, and if

the principal says, "No, I want you to change it now and pay it back," there's no damages. I don't understand that. I mean, that's a pretty basic point in this case.

Mr. Harris has made it perfectly clear who he's mad at. He's mad at the government. The government doesn't pay enough attention or whatever it is the story is. He sued the government. He was told he couldn't sue the government because the government has sovereign immunity. I didn't make that law. They are the ones who are contract parties with Ms. Dawson and with the people he wants to join in this class. He can't go after them -- he'd like to -- so he goes against us saying that when we did what they told us to do, or at least what we understood it to be, somehow we committed a tort. I just don't buy that.

Again, Great Lakes has no contractual relationship with Ms. Dawson. We're simply the agent of the Department and servicing the accounts. We have no incentive to capitalize interest incorrectly, just the opposite, because, in fact, the payment -- and this is in the record -- the Department might pay Great Lakes, say, $1.05 for every borrower allocated to it that is in school status, might pay the same amount for every borrower who is in -- isn't paying, for every -- that's in forbearance status, but it pays $2.85 for every borrower allocated to current repayment. The incentives are all the other way.

I mean, the record really will reflect -- Mr. Harris wants to talk about what he thinks the record is going to reflect -- it's going to reflect people diligently trying to do their job and a Department that is slow in responding, but it's our boss, and we've all worked with the government; we know how that works sometimes. And we're doing our best to try to carry out their instructions, but we're still following their instructions. We're following their guidance. I just don't understand as a basic principle how that gives rise to a tort claim by the borrower that is in a contractual relationship with the government against --

THE COURT: Well, I guess the explanation is you're trying to follow it now, but you made errors in the past, and you tried to cover them up. That's the tort -- the RICO theory.

MR. SHRINER: Yeah, I understand.

MR. HARRIS: And, Your Honor --

THE COURT: And I'm not going to answer that today, so you don't even need to respond to it really but --

MR. HARRIS: Your Honor, where was the motion to dismiss? I know they may have had other reasons for answering, but if they really believed that there was no injury here, that we were wrong about the regs or whatever --

THE COURT: All right. We're on Mr. Shriner's dime now so --

MR. SHRINER: Yeah. Thank you, Your Honor. There just

isn't any incentive out there for us to do it. It doesn't make any sense.

Let's get back because I don't want you to overlook what really is the case here with Ms. Dawson. There is a requirement that somebody who wants to be a class representative have standing. We know that. We also -- we know that the person is supposed to be a typical representative of the class. Someone who has not suffered a penny of loss is going to be the representative plaintiff in a class action for people who say they've sustained loss. The other thing: Why is this an -- why would -- wholly aside from the fact that you can sustain an action for damages based on the principal's failure to follow the -- the agent's failure to follow the principal's instruction in collecting the debt that is owed to the principal, wholly aside from that, the idea that the -- that anyone can not have lost any money and that makes her fundamentally different from thousands and thousands and probably hundreds of thousands of people in this class. How can she be an adequate class representative?

You get back to what they're suing for. They're suing for damages. Why aren't they suing for their clients simply to have their accounts readjusted? They didn't think of that. Why? Because, you know, you don't get fees for that. You get fees if you get money damages. Now, what are those money damages going to be? If the Department tells us to go back and unscramble

these things, how could you possibly sustain a damage claim on that? It's not in the interest of -- the *Aqua Dots* case has to do with whether she's an adequate class representative, the Seventh Circuit case where the defendant was fixing things and the plaintiff brought a lawsuit anyway. That's really what this case is about. How can you be an adequate --

THE COURT: I think their argument would be that you didn't fix the things until the suit was brought.

MR. SHRINER: What difference does it make? I mean, that's true in these other cases. Why would you pursue litigation, continue to pursue litigation -- and, again, I get back to where we're stuck in the middle because we're the agent -- we're not the principal; we can only do what we're told to do -- with how this could possibly be a tort claim against us. The *Aqua Dots* case says why would you choose a litigation alternative other than to have a basis for attorney's fees when the proper way to do this is to get -- to get the thing fixed, and when the defendant says we're causing it to be fixed, how do you say that the class representative who insists on having those very people who would like to get their money paid to them without having to pay a percentage of it to the lawyers -- this is the point *Aqua Dots* makes -- how do you impose that on the members of the class when you yourself haven't suffered a nickel's damage? I mean, it seems to me it's a huge adequacy of representation issue for this particular plaintiff and this

particular case.

And then I get back to the fact that, you know, I respectfully suggest -- I know I don't have to with you because you'll understand what I'm talking about -- this is not a case for a federal district court to come in and supervise the way the Department of Education runs its loan program. That's really what Mr. Harris is asking you to do: "Make me the private Attorney General to go in and make the Department of Education follow its own instructions," which, of course, it's free to change. This just doesn't make any sense to me at all as a class action, and it seems to me that the real problem with it is these plaintiffs don't want damages. You know, the *Bible* case suggested -- Judge Crabb referred to this in her ruling -- the proper remedy is going to be to go back and fix it, not to pay damages, not to pay damages with a third to the lawyers. That isn't in anyone's interest, and someone who insists on going that way is not an adequate class representative. I think that's the holding of *Aqua Dots*.

THE COURT: Okay. I need to give Mr. Harris a chance to respond to that because I do think Ms. Dawson does have some serious issues as the class representative because of the fact that she's in this repayment plan that has not taken a dime out of her pocket as a result of these errors, and if it gets fixed, she's going to have a remedy that is a hundred percent for her.

MR. HARRIS: So, Your Honor, when we talk about

adequacy, something Mr. Shriner said was completely contradicted by the record, and he said she's somewhat unique in the sense that she's on one of these repayment plans and hasn't paid more than she owes on her loans, like she hasn't paid off her wrongful debt yet. Out of the 360-some-thousand people in Docket 66, or maybe it was 330,000 people in Docket 66, their remediation project, they could only find a hundred people who actually had paid off more than they owed.

So this claim that people are uninjured, it doesn't go to adequacy because the Seventh Circuit has held, and we cited this case in our papers, that, you know, if it's a defense that's generally applicable to the class, it's not a Rule 23 issue because the class is going to stand or fall largely on that decision, and, Your Honor, again, like, there just is no out-of-pocket loss requirement under RICO. If there was, then *Phoenix Bond* was wrongly decided. They had no answer for that case, Your Honor, in their opposition to our renewed motion. They didn't even address it. And, you know, we fully briefed that injury issue. It really is a question of law for the Court to decide on the merits once we have the full factual record of, you know, who was inflated and who paid off and by how much.

But as far as the attorney's fees, Your Honor, and this *Aqua Dots* case from the Seventh Circuit, I can't wrap my mind around this argument every time Mr. Shriner makes it. That was a case where there was literally nothing that the plaintiff or

class counsel could possibly accomplish for the class, and it was a case where, you know, literally a full remedy had already been given. There was no entitlement to triple damages as a statutory matter. There was no entitlement to attorney's fees as a statutory matter.

What we have -- we have no problem -- if they want to properly remedy people's accounts, we're not saying that that's unacceptable. We're saying it hasn't been done yet, and we're saying that we have a statutory entitlement to threefold our damages. That's in the class's interest, Your Honor. That's in Ms. Dawson's interest to get threefold in damages. It's in 300,000 other people's interest to get threefold their damages, and, Your Honor, no matter whether the class receives cash damages or receives some form of equitable relief in terms of account adjustments downward, we have a statutory entitlement to attorney's fees if we prevail from the defendants. The class isn't paying for this case. They've never paid a cent. They're never going to pay a cent, you know, unless we get some common fund, you know, above and beyond a hundred percent recovery. Then maybe we could draw attorney's fees under a common fund theory, but right now, Your Honor, we have a statutory entitlement to triple damages and attorney's fees, and that's why we're pursuing the case.

THE COURT: Okay. All right. So I diverted to Mr. Harris to address the damages issue for Ms. Dawson. I'm not

sure you were finished.

MR. SHRINER: Almost, Your Honor, and I'll just pick up on this last point. I think I just heard him say that he'll rely entirely on whatever attorney's fees he recovers in his RICO claim and won't claim any common fund attorney's fees unless he recovers more for the class than they're entitled to already. That's odd.

No, I just wanted to say one other thing. I listen to a lot of what Mr. Harris thinks the proof is going to tell and this and that and the other thing. I simply want to point out to Your Honor, 19 pages of this reply brief includes facts that weren't included in the original complaint, in the original briefing on this. I haven't had an opportunity to respond to that. I don't particularly want to, and I don't think perhaps that's where you're going. You tell me if you do think that's important, and, if so, I'll ask for the opportunity to respond to it, but, you know, this is -- we're not doing so well on the class certification. Judge Crabb correctly pointed out that this is not a certifiable class at this point. I'm afraid that's going to happen again because, of course, Judge Crabb was the judge on the case when the briefs were submitted, so I'm going to try to rile her up and tell her what bad people these are, you know. This isn't a jury so --

THE COURT: All right. I'll take the class certification under advisement. Thank you all very much for

coming in and making so many things clearer to me, and I'm not giving myself a deadline on getting the decision out. I'm busy managing the affairs of the State of Wisconsin now and not the federal Department of Education. I'll get to them when I have time.

MR. SHRINER: Thank you, Your Honor.

MR. KASHIMA: Thank you, Your Honor.

MR. HARRIS: Thank you.

THE CLERK: This court stands adjourned.

(Proceedings concluded at 2:47 p.m.)

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I, JENNIFER L. DOBBRATZ, Certified Realtime and Merit Reporter in and for the State of Wisconsin, certify that the foregoing is a true and accurate record of the proceedings held on the 18th day of May, 2017, before the Honorable James D. Peterson, Chief U.S. District Judge for the Western District of Wisconsin, in my presence and reduced to writing in accordance with my stenographic notes made at said time and place.

Dated this 23rd day of May, 2017.

/s/ Jennifer L. Dobbratz

Jennifer L. Dobbratz, RMR, CRR, CRC
Federal Court Reporter